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No. 82-819

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE JAY CROZIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. The first question presented in this case is whether a district court must conduct a full evidentiary hearing on the issue of probable cause before it can enter a *restraining order* under 21 U.S.C. 848(d) to prevent the alienation of property named in an indictment as subject to forfeiture. Respondent Wolke repeatedly attempts to obscure this issue by asserting that the government *seized* all her property without a hearing (see Br. in Opp. 4-5, 11, 13, 16). In fact, the restraining order at issue here (Pet. App. 21a-25a) does not constitute a physical seizure of her property; it simply restricts her ability to dispose of some of that property before a trial is held to determine whether the property should be forfeited to the government. Thus, for example, respondent Wolke's various residences have not been "seized" (cf. Br. in Opp. 5 & n.3); she has been free to reside

in them while the restraining order is in effect.[1] Respondent Wolke's objection (Br. in Opp. 4) that the restraining order is based on speculation that she *might* dispose of forfeitable property is therefore quite mystifying. If she does not want to dispose of potentially forfeitable property, respondent Wolke is not affected by the restraining order at all.

Moreover, contrary to respondent Wolke's suggestion (Br. in Opp. 5, 11), the fact that certain properties have been the subject of foreclosure proceedings is not the result of the order restraining the sale of those properties. Rather, foreclosure is caused by the failure to maintain periodic mortgage payments; the situation is little different from that of a tenant who fails to pay rent. Given the grand jury's conclusion that the restrained properties were purchased with illicit drug profits, it is hardly surprising that respondent Wolke has been unable to maintain the mortgage payments once the arrest of respondents ended the flow of drug profits.[2]

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[1]The fact that some of respondent Wolke's personal property was seized pursuant to search warrants is, of course, irrelevant to the question of the validity of the restraining order.

[2]Respondent Wolke objects (Br. in Opp. 12) that the restraining order is "particularly egregious" because she is not named in the continuing criminal enterprise count. The finding of the grand jury was, however, that all these properties were the fruits of respondent Crozier's continuing criminal enterprise and hence forfeitable. Significantly, Wolke nowhere suggests that that she actually put up any of the money used to acquire the property. In any event, the decision of the court of appeals does not turn at all on the fact that Wolke was not charged with conducting a continuing criminal enterprise. If the court of appeals is, as we contend, incorrect in its view that a full evidentiary hearing on the issue of probable cause is required before the entry of every 21 U.S.C. 848 restraining order, respondent Wolke is free to argue on remand that she has an interest in the properties named in the indictment purchased with her own funds that are not fruits of the continuing criminal enterprise, and hence that, in the particular circumstances of this case, she is entitled to a pre-restraining-order hearing on the forfeitability of her interest. We intimate no view on whether such a hearing would be appropriate.

2. As explained in our petition (Pet. 10-13), review by this Court of the court of appeals' decision is important because the decision severely curtails the availability of the forfeiture remedy by imposing as a prerequisite what amounts to a dress rehearsal of the trial and therefore extensive discovery of the prosecution's case. Respondent Wolke's only answer to this dilemma is to belittle the strong government interest that is at stake. She blithely asserts (Br. in Opp. 10 n.7) that "[t]he burden of protecting a witness is the responsibility of the government," and hence the Court need not concern itself with the danger to government witnesses created by the need to call them to the stand to testify at an adversarial restraining order hearing.[3] If the government needs to protect its witness list, respondent advises, the problem is easily solved by foregoing the restraining order (*ibid.*). That this would eliminate the forfeiture remedy as a practical matter does not concern respondent; she advises that the government can resort to a civil forfeiture remedy (see Br. in Opp. 11 n.8).

These responses cannot justify the decision below. Congress enacted the criminal forfeiture statutes because it found them necessary to deter certain serious crimes. The preexisting civil forfeiture provisions are no substitute for

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[3]Respondent Wolke also dismisses this problem by stating (Br. in Opp. 14-15) that the question whether hearsay evidence is admissible at a restraining order hearing is not before this Court. But obviously an essential element of the determination whether a hearing is appropriate is consideration of the nature of the hearing that would be held. Given the clear implication of the decision below and the Ninth Circuit's explicit statement in *United States* v. *Spilotro*, 680 F.2d 612, 619 n.4 (1982) (see Pet. 12 n.9), it is sheer fantasy to suppose that, if certiorari were denied here, hearsay evidence would be admissible at the restraining order hearing required by the decision below simply because the decision does not explicitly address itself to that issue.

criminal forfeiture,[4] and Congress clearly did not intend to limit the availability of criminal forfeiture to cases where the government is willing to undermine its prosecution by conducting a pretrial rehearsal. The court of appeals' frustration of Congress' intent by the practical evisceration of the criminal forfeiture remedy warrants review by this Court.

3. Respondent Wolke correctly asserts (Pet. 10) that her constitutional guarantee of due process cannot be eliminated for the convenience of the government. But, as set forth in the petition (Pet. 13-15), due process does not require the hearing contemplated by the court of appeals. Just as the determination of probable cause in an indictment is sufficient, without any further hearing, to support pretrial restraints on a defendant's liberty, so too is the determination of probable cause and forfeitability in an indictment (which is based on a determination by an unbiased grand jury, not "the government's bare allegations" (Br. in Opp. 13)) sufficient to support a restraint on the alienation of property named as forfeitable.

Respondent Wolke's attempts to distinguish the two situations serve only to reinforce this analogy. First, like pretrial restraints on a defendant's liberty, the issuance of an order restraining the alienation of forfeitable property is expressly authorized by statute, 21 U.S.C. 848(d) (cf. Br. in Opp. 12). Second, we agree with respondent Wolke's statement (*ibid.*) that the purpose of pretrial restraints on liberty is to ensure the defendant's presence at trial. However,

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[4]Civil and criminal forfeiture statutes are not coextensive with respect to the property they cover and, moreover, as is demonstrated in this case, resort to civil forfeiture is often impossible because it exposes the prosecution's criminal case to civil discovery — the very problem that the decision below introduces into criminal forfeiture proceedings. See Pet. 14 n.11.

although this pretrial restraint also serves the purpose of ensuring that the trial can proceed without violating the defendant's Sixth Amendment right to be present at his trial, surely the primary reason for the restraint is to ensure that the defendant will be available if he is convicted at trial so that the sentence of the court can be executed. The restraining order entered here serves precisely the same purpose — to ensure that the property will still be available at trial so that the judgment of the court can be executed if the property is found to be forfeitable. Cf. Br. in Opp. 13.

4. With respect to the Fourth Amendment issues raised in the petition, respondent Wolke does not deny that the decision below and *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1980), on which it relies heavily, conflict with the Second Circuit's decision in *United States* v. *Segura*, 663 F.2d 411 (1981), petition for cert. pending, No. 82-5298 (see Br. in Opp. 22-23). Moreover, she is unable to distinguish several of the other cases cited in our petition (Pet. 19-20) —one of which expressly rejected *Allard* — on any basis other than that the courts did not follow the precise analysis set forth by the Ninth Circuit (see Br. in Opp. 21 n.14). That "distinction" does not alter the fact that evidence discovered pursuant to a valid warrant search that was preceded, but not tainted, by an illegal entry would be suppressed in the Ninth Circuit and admitted in several other circuits. Thus, there is no basis for respondent Wolke's conclusory assertion (*id.* at 23) that "the conflict is not of * * * such a broad magnitude as to" warrant certiorari. To the contrary, the "magnitude" of the conflict continues to increase. Since our petition was filed, the New York Court of Appeals has also expressly rejected *Allard* and held that evidence seized pursuant to a search warrant untainted by a previous illegal entry should not be suppressed. *People* v. *Arnau*, 32 Crim. L. Rep. (BNA) 2288 (Jan. 12, 1983). This conflict in the lower courts warrants review by this Court.

Apart from being unresponsive to the question whether review should be granted, respondent Wolke's contention that the decision below is correct on this issue completely misconceives the well established rule that evidence should be suppressed only if it is tainted by an illegality. The government, of course, does not contend that "a facially valid search warrant * * * retroactively validate[s] prior illegal police action" (Br. in Opp. 18). We do contend that the illegal entry here did not contribute to the discovery of the illegal evidence, which was solely the product of the valid warrant search; hence, the suppressed evidence was not a fruit of the illegal entry (see Pet. 17-19). Respondent Wolke asserts (Br. in Opp. 18) that "aside from the warrant itself * * * the government failed to demonstrate that it would have 'independently discovered' [the] evidence, notwithstanding the illegal seizure." But as explained in our petition (Pet. 18-19), it is undisputed that the police lawfully could have secured the premises from the outside, and thus the evidence surely would have been discovered pursuant to the warrant whether or not the illegal entry took place. The only way such discovery could have been avoided would have been if the persons inside the residence (and there were no persons inside the Crozier residence) had destroyed the incriminating evidence while the officers were awaiting the warrant; surely the Fourth Amendment does not exist to guarantee the availability of this option.

5. Respondent Wolke suggests (Br. in Opp. 24-26) that evidence seized pursuant to the Crozier warrant correctly was suppressed because the seizures exceeded the scope of the warrant. Assuming arguendo that some materials were seized that were beyond the authorization of the warrant, that would not be grounds for suppressing all of the evidence as the court of appeals did, at least in the absence of a finding that the officers flagrantly ignored the limitations of the warrant. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir.

1978). There was no such finding here; indeed, the opinion of the court of appeals plainly indicates that it struck down the warrant itself as overbroad on its face without reference to the manner in which the search was executed (see Pet. App. 6a-7a), and hence the scope of the actual seizure is irrelevant here. As stated in our petition (Pet. 20-21), the warrant (set forth at Pet. 6 n.6) specified certain chemicals to be seized and was drawn as narrowly as possible in authorizing a search for notes and formulas at a particular site that are evidence of drug manufacture. The courts routinely have approved such warrants. See, *e.g.*, *United States* v. *Christine*, 687 F.2d 749, 753 (3d Cir. 1982); *United States* v. *Malik*, 680 F.2d 1162 (7th Cir. 1982); *United States* v. *Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982). The decision of the court of appeals invalidating the warrant as general is inconsistent with *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976), and, if followed, will severely limit the ability of law enforcement agents in the Ninth Circuit to obtain documentary evidence from a known site of criminal activity.

CONCLUSION

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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